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No. _____

In The
Supreme Court of the United States

PATRICK TIMOTHY RICHARDSON,
Petitioner,

v.

NATHANIEL QUARTERMAN, DIRECTOR, TEXAS DEPARTMENT OF CRIMNAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

GARY A. UDASHEN
Counsel of Record
SORRELS, UDASHEN & ANTON
2301 CEDAR SPRINGS ROAD
SUITE 400
DALLAS, TEXAS 75201
214-468-8100
214-468-8104 fax

Counsel for Petitioner

December 18, 2008

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

QUESTION FOR REVIEW

The Fifth Circuit Court of Appeals has entered a decision in conflict with the Seventh Circuit Court of Appeals on the same important question. *See Franklin v. McCaughtry*, 398 F.3d 955, 960 (7th Cir. 2005). The question is whether the failure to recuse a judge based on the appearance of bias is a due process violation which is not subject to a harmless error analysis.

PARTIES TO PROCEEDINGS

Patrick Timothy Richardson - Petitioner
represented by
Gary A. Udashen
Sorrels, Udashen & Anton
2301 Cedar Springs Road
Suite 400
Dallas, Texas 75201
214-468-8100
Counsel for Petitioner

Nathaniel Quarterman, Director, Texas Department of Criminal Justice, Correctional Institutions Division - Respondent
represented by
Greg Abbott
Texas Attorney General
Tommy L. Skaggs
Jon R. Meador
Edward L. Marshall
Assistant Attorney Generals
300 W. 15th Street
Austin, Texas 78701
512-936-1400
Counsel for Respondent

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Petitioner, PATRICK TIMOTHY RICHARDSON, hereby petitions for a writ of certiorari to review the opinion of the United States Court of Appeals for the Fifth Circuit (entered July 28, 2008) (See Appendix A). A motion for rehearing was filed with the Court of Appeals, and denied on October 1, 2008. (See Appendix E).

OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit dated July 28, 2008 is found at 537 F.3d 466 (5th Cir. 2008).

A copy of this opinion may be found in Appendix A.

STATEMENT OF JURISDICTION

The Court of Appeals' opinion was entered on July 28, 2008. Petitioner's Petition for Rehearing was denied on October 1, 2008, and a copy of the order denying rehearing may be found in Appendix E.

Federal court jurisdiction was initially invoked pursuant to 28 U.S.C. §2254 by the filing of an application for writ of habeas corpus in the Federal District Court.

This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment V, U. S. Constitution

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment XIV, Sect. 1, U. S. Constitution

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Procedural History

Richardson was convicted of the offense of murder in Texas state court and assessed a sentence of 60 years confinement and a fine of $10,000.00. Appeal was taken and on August 1, 2002, the Texas Court of Appeals for the 13th District affirmed the conviction. *Richardson v. State*, 83 S.W.3d 332 (Tex. App. - Corpus Christi 2002, *pet. ref'd*). Richardson's motion for rehearing was overruled. Richardson filed a Petition for Discretionary Review which the Court of Criminal Appeals denied. Richardson filed a state Application for Writ of Habeas Corpus. This Application was denied by the Texas Court of Criminal Appeals on March 31, 2004. On June 28, 2004, Richardson filed a Petition for a Writ of Habeas Corpus By a Person in State Custody in Federal District Court. (R I, p. 5). On June 29, 2006, the Magistrate Judge recommended relief be denied. (R I, p. 123). Richardson filed objections to this recommendation. On July 26, 2006, the District Court entered judgment denying the Petition. Richardson gave notice of appeal and the Fifth Circuit Court of Appeals granted a certificate of appealability on February 5, 2007. (Appendix D). On July 28, 2008, a panel of the Court of Appeals issued a decision affirming the Judgment of the District Court. On August 18, 2008, Richardson filed a Petition for Rehearing which was denied on October 1, 2008.

Statement of the Facts

Richardson filed a motion in state court for recusal of the judge. The state court denied the motion. The Texas Court of Appeals found that the trial judge

should have been recused but found the error harmless. A complete discussion of the underlying facts is contained in the argument portion of this brief.

QUESTION FOR REVIEW

The Fifth Circuit Court of Appeals has entered a decision in conflict with the Seventh Circuit Court of Appeals on the same important question. *See Franklin v. McCaughtry*, 398 F.3d 955, 960 (7th Cir. 2005). The question is whether the failure to recuse a judge based on the appearance of bias is a due process violation which is not subject to a harmless error analysis.

REASONS FOR GRANTING THE PETITION

This proceeding involves a question of exceptional importance, i.e., whether an appearance of bias by a trial judge, without a showing of actual bias, is a due process violation constituting structural error requiring reversal without engaging in a harmless error analysis. The Fifth Circuit in this case said no. However, the Fifth Circuit opinion is in conflict with an opinion from the Seventh Circuit Court of Appeals addressing the same issue. *See Franklin v. McCaughtry*, 398 F.3d 955, 960 (7th Cir. 2005) (finding both actual bias and the appearance of bias in a trial judge to violate due process, and that both are structural error subject to automatic reversal).

The exceptional importance of this question lies in the fact that an appearance of judicial bias goes directly to the question of the public faith in the judicial system. If a reasonable member of the public doubts the fairness and impartiality of a trial judge then that same reasonable member of the public would

expect the judge to be recused from the case. When appellate courts engage in harmless error analysis and refuse to reverse a judgment rendered by a judge under the cloud of an appearance of bias, doubts will invariably linger as to the general fairness of the entire system.

ARGUMENT

Recusal Motion in State Court

Richardson filed a motion to recuse Judge Henry Wade, Jr. and a recusal hearing was held. Richardson urged that the court grant the motion to recuse because Judge Wade's impartiality was questionable and also because he had a personal bias and prejudice against Richardson. (R. III, p. 90). Judge Wade's wife (Judge Kristin Wade) had been personally acquainted with Mary Richardson (the alleged victim) and had worked closely with her in an organization called the Dallas Junior League. (R. III, p. 93). Nevertheless, the court denied the motion to recuse. (R. III, p. 100). In order to address this Ground, a summary of the facts presented during the recusal hearing is set forth, as follows:

Connie O'Neil testified that she was the past president of the Dallas Junior League which is a volunteer organization involved in community projects. (R. III, p. 5-6). O'Neil said that the Junior League had a Board of Directors as well as a Leadership Council that consisted of approximately forty to forty-two members. (R. III, p. 6-7). O'Neil stated that, when she was president of the Junior League, both Mary Richardson and Judge Kristin Wade were members of the Leadership Council in the Junior League. (R. III,

p. 8-9). Judge Kristin Wade also held the position of Planning Vice President in the Junior League and was also on the Board of Directors. (R. III, p. 13). O'Neil stated that the Leadership Council met seven to eight times per year and that both Mary Richardson and Kristin Wade would have worked together during those meetings on several occasions. (R. III, p. 9).

O'Neil further stated that on December 6, 1998, she had a party at her home and that, as best she recalled, both the Richardsons and the Wades attended the party. (R. III, p. 10). O'Neil further stated that she had one of Judge Kristin Wade's campaign signs in her yard. (R. III, p. 12). O'Neil testified that both Mary Richardson and Judge Kristin Wade could be described as being actively involved in the Junior League. (R. III, p. 14-150.

Judge Kristin Wade testified that she was a Dallas County Judge and married to Henry Wade, Jr. who was the Judge of the 292nd Judicial District Court in Dallas. (R. III, p. 21). Judge Kristin Wade stated that both she and Mary Richardson were members of the Leadership Council of the Dallas Junior League and that they attended meetings together. (R. III, p. 22-23). Judge Kristin Wade said that she conversed with Mary Richardson and had a good impression of her. (R. III, p. 24). On December 6, 1998, Judge Kristin Wade and her husband Judge Henry Wade, Jr. attended a party at the home of Connie O'Neil that was also attended by Mary Richardson. (R. III, p. 25).

On September 19, 1999, a Junior League member telephoned her and told her that Mary Richardson had been killed by her husband. (R. III, p. 27). Judge Kristin Wade related that information to her husband.

(R. III, p. 28). On the following day [a Monday], she discussed the news coverage of the posting of the bond with her husband Judge Henry Wade, Jr. (R. III, p. 33).

Judge Kristin Wade then received a number of telephone calls from Junior League members concerning the setting of the bond amount and the fact that Richardson was out on bond. (R. III, p. 30, 36-37). Judge Kristin Wade said that she then personally talked with Judge Ed King who had set the bond amount in this case. (R. III, p. 37). According to Judge Kristin Wade, she thought that possibly the news report was not accurate regarding the bond amount. (R. III, p. 38). Judge Kristin Wade then talked with Cindy Dyer, the prosecutor, and learned that a motion to increase the bond amount had been filed. (R. III, p. 39-40). Judge Kristin Wade also said that she then directed telephone calls from Junior League members to Ms. Dyer. (R. III, p. 40).

Judge Kristin Wade also testified that on September 22, 1999, she attended Mary Richardson's funeral. (R. III, p. 40-41). After the funeral, a reception was held at the Junior League headquarters and Judge Kristin Wade admitted that the Junior League members were outraged that Richardson was out on bond. (R. III, p. 42-43). Judge Kristin Wade also said that her husband was aware of the fact that she had attended the funeral. (R. III, p. 45).

Judge Kristin Wade also testified that a number of Junior League members had contributed to her political campaign. (R. III, p. 51-54). Judge Kristin Wade said that a friend named Michelle Schieve had once been a member of the Junior League and she had

also worked on her husband's political campaign. (R. III, p. 57). Judge Kristin Wade stated that she learned on the morning of September 23, 2000 (a Thursday) that this case had been assigned to her husband Judge Henry Wade, Jr. (R. III, p. 47-48).

Judge Henry Wade, Jr. testified that he was the Judge of the 292nd Judicial District Court and was married to Judge Kristin Wade who was a member of the Junior League. (R. III, p. 66-67). On the evening of September 19, 1999, Judge Henry Wade learned that Mary Richardson, a member of the Junior League, had died. (R. III, p. 68). Judge Henry Wade said that he was aware of the fact that members of the Junior League had called his wife and were upset about the bond. (R. III, p. 69). Judge Henry Wade also said that he was aware that his wife had attended Richardson's funeral and reception. (R. III, p. 70).

Judge Henry Wade further testified that he heard that the bond amount was originally set in the amount of $30,000.00. (R. III, p. 71). At first, the Judge thought that the amount was probably a $300,000 surety bond or $30,000 cash bond but he later learned that no cash bond was required. (R. III, p. 71). Richardson posted a bond on Monday, September 20, 1999, and the prosecutor Cindy Dyer presented Judge Henry Wade with a motion to hold the bond insufficient several days prior to the date that the case was assigned to Judge Henry Wade. (R. III, p. 74-75). Judge Henry Wade then discussed the bond amount with Judge King, who had set the $30,000 bond, but Judge Wade did not take any action on the motion. (R. III, p. 74-75). On the morning of September 23, 1999, (after the case had been assigned to Judge Henry Wade, Jr.), prosecutor Dyer presented Judge Henry

Wade with a motion to hold the bond insufficient. (R. III, p. 78). Judge Henry Wade, without a hearing and without Richardson's attorney present, held the bond insufficient and raised the bond amount from $30,000 to $1,000,000. (R. III, p. 79, 84). An arrest warrant was issued for Richardson who subsequently voluntarily surrendered. (R. III, p. 79, 81).

In addressing the issue on appeal, the Corpus Christi Court of Appeals stated the following (see *Richardson v. State*, 83 S.W.3d 332 (Tex. App. - Corpus Christi 2002, *pet. ref'd*):

> "In summary, the undisputed evidence included the following:
>
> 1. Judge Kristin Wade, wife of the trial judge, is a member of the Junior League of Dallas.
> 2. Judge Kristin Wade served on the leadership council of the Junior League with the deceased, a group that consisted of approximately 40-42 members, which had met approximately 7-8 times.
> 3. After Richardson's bond was set at $30,000, several members of the Junior League called Judge Kristin Wade. In general, the callers were outraged that Richardson was out on bond.
> 4. At some point Judge Kristin Wade expressed to her husband, the trial judge, her personal disapproval of the amount of Richardson's bond.
> 5. On the day after the murder, Judge Kristin Wade contacted the judge who set the bond and an assistant district attorney involved in the case and discussed the bond with them.
> 6. Judge Kristin Wade attended the deceased's funeral and a reception following at the

headquarters of the Junior League. While at first Judge Kristin Wade testified that the general consensus of those at the reception was outrage that Richardson was out on bond, she later testified that, "I really don't know that there was much bond conversation at all at that particular reception." One of those to whom she spoke at the reception was O'Neil, the Junior League's immediate past president.

7. Prior to the case having been assigned to him, Judge Henry Wade, Jr. knew of the phone calls his wife had received from friends who were unhappy about the situation relating to Richardson's bond.

8. Judge Henry Wade, Jr. knew that his wife knew the deceased through the Junior League and that she had attended both the funeral and the reception.

9. The district attorney's office presented a motion to raise Richardson's bond to Judge Henry Wade, Jr. prior to the case having been assigned to him.

10. The morning that the case was assigned to him, Judge Henry Wade, Jr. raised the amount of Richardson's bond from $30,000 to $1,000,000 without a hearing and in the absence of Richardson's counsel.

One of the bases for Richardson's motion was that Judge Henry Wade, Jr. should be recused because his impartiality might reasonably be questioned. The trial court's duty was to determine whether the movant had provided facts sufficient to establish that a reasonable member of the public at large, knowing all the facts involved in the public domain concerning

> the judge's conduct, would have a reasonable doubt that the judge is actually impartial. *Sears v. Nueces County*, 28 S.W.3d 611, 615 (Tex. App. - Corpus Christi 2000, no pet.).
>
> We hold that when the totality of the evidence is considered, Richardson has produced undisputed evidence that would show that a reasonable member of the public, knowing all the circumstances involved, would have questions or doubts as to the impartiality of the trial judge. We therefore hold that the trial court's denial of Richardson's motion to recuse is an abuse of discretion because it is outside the range of reasonable disagreement."

Summary of Questions Presented in Petition

The questions raised in this petition are twofold. First, was there error in the denial of the motion to recuse Judge Wade that resulted in a violation of Richardson's due process rights. The Texas Court of Appeals has correctly decided that the recusal motion should have been granted. Secondly, was the Texas Court of Appeals correct to engage in a harm analysis and find the failure to recuse Judge Wade to be harmless. On this question, the Texas Court acted improperly. Following the lead of the Texas Court, the Fifth Circuit Court of Appeals approved the use of a harmless error analysis. This decision is in direct conflict with the decision of the Seventh Circuit in *Franklin v. McCaughtry*, 398 F.3d 955, 960 (7th Cir. 2005).

Due Process: Structural Error

It cannot be gainsaid that "a fair trial before an unbiased judge is a basic requirement of due process." *Chitimacha Tribe of Louisiana v. Harry L. Laws Co., Inc.*, 690 F.2d 1157, 1164-65 (5th Cir. 1982). To this end, in *Chapman v. California*, 386 U.S. 18, 24 n.8 (1967) the United States Supreme Court set forth three types of errors that could never be treated as harmless error. Among them was trial by an impartial judge. *Id.* (citing *Tumey v. Ohio*, 273 U.S. 510 (1927)). As the Court noted in *Tumey*, "Every procedure which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear, and true between the state and the accused denies the latter due process of law." 273 U.S. at 532. The practice is so banal that trial before an impartial judge "def[ies] analysis by 'harmless-error' standards. The entire conduct of the trial from beginning to end is obviously affected by the . . . presence on the bench of a judge who is not impartial." *Arizona v. Fulminante*, 499 U.S. 279, 307, 309-10 (1991). Richardson's case was marred by just such structural error as contemplated by *Chapman*, *Tumey*, and *Fulminante*. For this reason, the state court's application of a harm analysis is contrary to clearly established federal law.

Due Process: Bias and Appearance of Bias

At the outset, it is instructive to note that even the state Court of Appeals admitted that "a reasonable member of the public, knowing all the circumstances involved, would have questions or doubts as to the impartiality of the trial judge." *Slip Op.* at 358-59. In

Bradshaw v. McCotter, 785 F.2d 1327, 1329-30 (5th Cir. 1986), *modified*, 796 F.2d 100 (5th Cir. 1986), the Fifth Circuit noted that a fair tribunal "requires not only an absence of actual bias ... [b]ut to perform its high function in the best way justice must satisfy the appearance of justice." *Id.* (citing *In re Murchison,* 349 U.S. 133, 136 (1955), as source for quote from *Offutt v. United States,* 348 U.S. 11, 14 (1954)).

It has been determined that a finding of bias and the appearance of partiality constitutes structural error. *Cf. Bracy v. Gramley,* 520 U.S. 899, 905 (1997) (holding that bias would violate due process if a judge was inclined to rule against defendants who did not bribe him). The rationale for this rule is found within the very meaning of "impartiality." The Supreme Court, addressing the meaning of "impartiality" in the judicial context – and with reference to the proposition that trial before an impartial judge is essential to Due Process – stated that it was "the lack of bias for or against either party to the proceeding. . . . [that] assures equal application of the law." *Republican Party of Minnesota v. White,* 536 U.S. 765, 775-76 (2002).

To the extent that the state contends that a different standard applies to a showing of "actual bias" or "presumptive bias" as opposed to a situation where "a reasonable member of the public, knowing all the circumstances involved, would have questions or doubts as to the impartiality of the trial judge," such a distinction is illusory and untenable. The essential problem with any attempt to draw such a distinction is determining where the line is crossed from the public's doubts as to the impartiality of the trial judge to a finding that the trial judge is actually or

presumptively biased. As all judges and litigants well know every trial is fraught with opportunities for a judge to show bias or favoritism, either through legal rulings, attitude towards the parties and even intangible factors such as facial expressions or tone of voice. The purpose behind requiring recusal when "a reasonable member of the public, knowing all the circumstances involved, would have questions or doubts as to the impartiality of the trial judge," is to avoid such arbitrary line drawing. If a reasonable member of the public would question the judges impartiality, he simply should not be the judge on the case. Allowing a judge to preside over a case in these circumstances creates, at least in the view of the public, a justice system where fairness and impartiality are seriously and legitimately questioned.

It follows that there is no acceptable reason to distinguish between a finding of actual bias or presumptive bias and the appearance of bias. Required recusal in all of these circumstances achieve the same ultimate goal; public faith in the fairness of our courts. A finding of structural error is required under the due process clause and applicable case law and attempting to draw fine distinctions between these categories of bias is futile and only adds to a suspicion of partiality in the administration of justice. *See*, *In re Murchison*, 349 U.S. 133 (1955) (to perform its high function in the best way, justice must satisfy the appearance of justice).

Richardson also urges the Court to examine the question of whether there is any real difference between actual bias, presumptive bias and an appearance of bias. Actual bias is not established unless a judicial proceeding has occurred and the judge

actually acted in a biased manner. The term presumptive bias, as recognized by the panel opinion in the case at bar, is a species of bias where the Courts have recognized that the appearance of bias is always present. In both of these situations, there is clearly no harmless error analysis.

The appearance of bias is, in reality, indistinguishable from the areas that have been labeled as presumptive bias. The appearance of bias language used by the state court in the case at bar was "a reasonable member of the public, knowing all the circumstances involved, would have questions or doubts as to the impartiality of the trial judge." This standard is based on what a reasonable person would think. If a reasonable person would think that the judge is biased then there is no principled way of distinguishing the situation from those previously categorized as presumptive bias. In other words, under both circumstances, the question is what would a reasonable member of the public think.

Opinion of Court of Appeals for the Fifth Circuit

The Fifth Circuit identified the areas where the United States Supreme Court has found that bias, other than actual bias, to always require reversal as,

> (1) when the judge has a direct personal, substantial, and pecuniary interest in the outcome of the case; (2) when he has been the target of personal abuse or criticism from the party before him and (3) when he has the dual role of investigating and adjudicating disputes and complaints. (Fifth Circuit opinion, pp. 12-13).

The Fifth Circuit opinion recognized that this list is not exclusive and comprehensive. Nevertheless, the court found the appearance of bias in this case to not be the type of bias which would presumptively require recusal.

The problem with attempting to quantify and rank the reasons that would cause a reasonable member of the public to question the impartiality of the judge is that this undermines the underlying rationale for the due process requirement requiring recusal of a potentially biased judge. If a reasonable member of the public would question the judge's partiality that, *ipso facto*, establishes that the reasons for the potential bias are serious enough to require recusal. The fact that a reasonable member of the public would have this belief is sufficient to place the case into the category of bias where recusal is required and where a harmless error analysis is inappropriate. In other words, to state that some of the reasons for an appearance of bias are sufficient to require recusal, while some are not, is to create a false distinction that undermines the reasoning of the case law discussing recusal.

Contrary Authority From Seventh Circuit

The Fifth Circuit recognized that the Seventh Circuit has reached the opposite conclusion on this same question in *Franklin v. McCaughtry*, 398 F.3d 955, 960 (7th Cir. 2005). The Fifth Circuit summarizes *Franklin* as follows:

> "Citing *Bracy v. Schomig*, 286 F.3d 406, 410-11 (7th Cir. 2002) (en banc), the Seventh Circuit held that the state's test was contrary to clearly

established federal law because both actual bias and the appearance of bias in a trial judge violate a defendant's due process rights, and both are considered structural error subject to automatic reversal. *Franklin*, 398 F.3d at 960-61. In *Bracy*, the Seventh Circuit stated in dicta that the pertinent Supreme Court cases "tell us that ordinarily 'actual bias' is not required, the appearance of bias is sufficient to disqualify a judge." 286 F.3d at 411."

Richardson would urge the Court to consider this Seventh Circuit case in determining whether to grant this petition for writ of certiorari. If the Seventh Circuit is correct, then the Fifth Circuit is incorrect. This Circuit split on such an important and fundamental question should be resolved by the Supreme Court.

Deference to Texas Court Finding

The District Court in the case at bar concluded that there was no need to give any deference to the Texas Court of Appeals finding that, "a reasonable member of the public knowing all the circumstances involved, would have questions or doubts as to the impartiality of the judge." The Fifth Circuit upheld this conclusion. The Fifth Circuit noted that the Federal Court's role under 28 U.S.C. §2254 is to decide whether the state court's decision that Richardson was not entitled to a new trial constituted a "decision that was contrary to, or involved an unreasonable application of clearly established federal law, as determined by the Supreme Court of the United States." The Court found that the conclusion reached by the state court did not meet that test and that the "implied intermediate steps of legal

reasoning are ultimately irrelevant to our said holding." (Fifth Circuit Opinion, p. 21). Under this reasoning, if the Supreme Court was to grant this petition and reverse the finding by the Fifth Circuit and conclude that established Supreme Court precedent dictates that the appearance of bias is structural error not subject to a harmless error analysis, then the conclusion of the Texas Court would be subject to reversal by the federal courts under §2254. In other words, the determination of the question of the proper deference to be given to the state court's finding of the appearance of bias is fully intertwined and dependent on the resolution of the question of whether the appearance of bias is structural error. If the Seventh Circuit is correct and the Fifth Circuit in the case at bar is incorrect then the state court has issued a decision that was contrary to or involved an unreasonable application of federal law, as determined by the Supreme Court. If that is the conclusion of the Supreme Court, then the "ultimate decision" of the state court is what would be subject to review by the Federal Court. The recognition of an appearance of bias by the state court would be simply an intermediate stop of legal reasoning, and not subject to review by the Federal Court. The question would simply be whether an appearance of bias is structural error not subject to a harmless error analysis.

CONCLUSION

FOR THE REASONS STATED, Petitioner requests that the Supreme Court grant this Petition for Writ of Certiorari.

Respectfully submitted,

GARY A. UDASHEN
Bar Card No. 20369590
SORRELS, UDASHEN & ANTON
2301 Cedar Springs Road
Suite 400
Dallas, Texas 75201
214-468-8100
214-468-8104 fax

Attorney for Petitioner

APPENDIX

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 06-10872

[Filed July 28, 2008]

PATRICK TIMOTHY RICHARDSON
Petitioner-Appellant,

v.

NATHANIEL QUARTERMAN, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION,
Respondent-Appellee.

Appeal from the United States District Court for the Northern District of Texas

Before JONES, Chief Judge, and GARWOOD, and JOLLY, Circuit Judges.

GARWOOD, Circuit Judge:

Petitioner-Appellant, Patrick Timothy Richardson (Richardson), a Texas prisoner, pleaded guilty in a

Texas court to the murder of his wife, Mary Richardson. The wife of the trial judge who presided in his case was an acquaintance of Mary Richardson. Thus, before his trial, Richardson filed a motion to recuse the trial judge. Following a pretrial hearing, an assigned administrative judge denied this motion. After unsuccessfully appealing his conviction in state court and filing a state habeas application, Richardson filed an application for a federal writ of habeas corpus under 28 U.S.C. § 2254 arguing, *inter alia*, that the trial judge should have been recused from his case. The district court denied Richardson's petition for habeas relief and Richardson now appeals its decision. For the following reasons, we affirm the judgment of the district court.

FACTS AND PROCEEDINGS BELOW

On March 29, 2000, Richardson was indicted in Dallas County, Texas, for the September 19, 1999 murder of his wife, Mary Richardson. Immediately after the murder, Judge King set the bond in Richardson's case. However, the case was assigned to Judge Henry Wade, Jr. a few days later, on Thursday, September 23. On Friday, September 24, 1999, Richardson made a motion in the trial court to recuse Judge Henry Wade, Jr., claiming that the judge's impartiality might reasonably be questioned because his wife, Judge Kristin Wade, was an acquaintance of the murder victim. Both Judge Henry Wade, Jr. and Judge Kristin Wade testified regarding their connections to Mary Richardson in a recusal hearing held in the state trial court on October 8, 1999. Judge Pat McDowell, the presiding administrative judge who conducted the recusal hearing, denied Richardson's request to recuse Judge Henry Wade, Jr.

At the time of Mary Richardson's death, Judge Kristin Wade was a member of the Junior League of Dallas (the Junior League), a volunteer organization with approximately 5,600 members, all Dallas area women. Both she and Mary Richardson served on the Junior League leadership council, which consisted of approximately forty or forty-two members, and met seven or eight times between June 1, 1998 and May 31, 1999, the Junior League's administrative year before Mary Richardson's death.

At the recusal hearing, Judge Kristin Wade testified that she would classify Mary Richardson as more of an acquaintance than a friend, and that their conversations generally centered around Junior League business. She did not know personal details about Mary Richardson, such as the number or names of her children. Furthermore, neither she nor her husband, who are elected judges, received campaign contributions from the deceased. Judge Kristin Wade also testified that she worked with Mary Richardson at leadership counsel meetings on at least a few occasions. On December 6, 1998, the two women also attended a party at the house of Connie O'Neil, the president of the Junior League at that time. Judge Henry Wade, Jr. attended this party with his wife, and Richardson most likely also attended with Mary Richardson. Judge Kristin Wade testified that both she and her husband most likely met the Richardsons at this party. Judge Kristin Wade testified she had never been to the Richardson home and Mrs. Richardson had never been to her home.

Within a day of when Richardson was arrested for the murder of his wife on Sunday, September 19, 1999, he was released on a $30,000 bond set by Judge King.

Judge Kristin Wade testified that the day after the murder, Monday, September 20, 1999, she discussed Richardson's bond with her husband on the way to work. She denied that they discussed whether the bond amount was set too high or low, although she did admit that at some point, she told her husband that she disapproved of the amount of Richardson's bond. That Monday and Tuesday, about five or six members of the Junior League called Judge Kristin Wade regarding the murder. Several of these callers indicated that they thought Richardson should not be out on bond and that the bond was set too low. On one of those days, Judge Kristin Wade contacted Judge King and an assistant district attorney involved in the case to seek information regarding the bond so that she could answer the callers' questions and know whom she should tell them to contact with their concerns.

On Wednesday, September 22, 1999, Judge Kristin Wade also attended Mary Richardson's funeral and a reception following the funeral at the headquarters of the Junior League. While she first testified that the general consensus at the reception was outrage that Richardson was out on bond, she later stated that, "[she] really [did not] know that there was much bond conversation at all at that particular reception." After Judge Henry Wade, Jr. was assigned the case on Thursday, September 23, 1999, Judge Kristin Wade called Junior League headquarters, and spoke with Connie O'Neil and maybe one other woman to tell them that no one should call her regarding Richardson because she could no longer discuss the case.

Before he was assigned the case, Judge Henry Wade, Jr. knew of the phone calls his wife had received

from Junior League members who were unhappy about Richardson's bond. He was also aware that his wife knew Mary Richardson through the Junior League and that she had attended both her funeral and the following reception at the Junior League. He testified that he did not know either the deceased or Richardson, and that he would not be biased or influenced by the fact that the deceased had been a member of the Junior League with his wife. There is no evidence that Judge Henry Wade, Jr. had ever been in the Richardson home or that either Richardson had ever been in the Wade home.

Other than outlined above, there is no evidence of any relationship or connection between either Richardson and either Wade.

On Tuesday, September 21, 1999, before Judge Henry Wade, Jr. was assigned the case, the district attorney's office presented to him a motion to hold Richardson's bond insufficient. The Thursday morning that the case was assigned to him, Judge Henry Wade, Jr. raised the amount of Richardson's bond from $30,000 to $1,000,000 without a hearing and in the absence of Richardson's counsel.

After September 24, 1999, and before trial, Richardson filed a motion to recuse Judge Henry Wade, Jr. Judge Pat McDowell, an administrative judge, held a recusal hearing on October 8, 1999, and denied Richardson's request to recuse. Trial was held in May 2000. At trial, Richardson pleaded guilty, to a jury, to the murder of his wife. After hearing evidence at a trial on punishment the jury convicted Richardson of murder, and assessed him a sentence of sixty years confinement and a fine of $10,000.

On Richardson's direct appeal, he argued, *inter alia*, that Judge Henry Wade, Jr. was biased and should have been recused because his wife knew the deceased. On August 1, 2002, a Texas appellate court affirmed Richardson's conviction. *Richardson v. State*, 83 S.W.3d 332, 362 (Tex. App.—Corpus Christi 2003, pet. ref'd). It applied the recusal standard set forth in Texas case law, and held that the trial court should have recused Judge Henry Wade, Jr. because the "undisputed evidence" (as outlined by the court of appeals) at the recusal hearing demonstrated that "a reasonable member of the public, knowing all the circumstances involved, would have questions or doubts as to the impartiality of the trial judge." *See id.* at 358-59 (citing *Sears v. Nueces County*, 28 S.W.3d 611, 615 (Tex. App.—Corpus Christi 2000, no pet.) and *Woodruff v. Wright*, 51 S.W.3d 727, 738 (Tex. App.—Texarkana 2001, pet. denied)). The court of appeals also noted that it did not find "that there was any actual bias, prejudice, or partiality on the part of Judge Henry Wade Jr." *Id.* at 359. Finally, the court went on to hold that the failure to recuse Judge Henry Wade, Jr. was harmless error under Texas Rule of Appellate Procedure 44.2. *Id.* at 360.[1] The court of

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[1] With regards to its harmless error analysis, the court of appeals stated, "[c]onsidering the totality of the record, including the fact that the jury assessed Richardson's punishment; the severity of the crime which he committed; and the lack of any showing that the judge did anything during the punishment hearing indicating bias or partiality, we hold that Richardson's substantive rights were not affected, and we further hold, beyond a reasonable doubt, that any error in denying his motion to recuse did not contribute either to his conviction or punishment. Richardson makes no argument that he was harmed and presents no authority with respect to harm." *Richardson*, 83 S.W.3d at 360.

appeals denied Richardson's petition for rehearing of its decision, and the Texas Court of Criminal Appeals refused Richardson's petition for discretionary review.

Richardson filed a state habeas application on December 22, 2003, arguing, *inter alia*, that the Texas court of appeals improperly engaged in harmless error analysis and that, in the alternative, the error was not harmless. The state filed a response to this application arguing that Richardson's habeas application should be denied. Richardson also filed a motion requesting that Judge Henry Wade, Jr. be recused from the habeas proceedings, which the trial court granted in an Order of Recusal on February 9, 2004. On February 17, 2004, the trial court denied Richardson's state habeas application, finding that "there [were] no controverted, previously unresolved facts material to the legality of the [Richardson's] confinement which require[d] an evidentiary hearing." Thus, no additional evidentiary hearing was conducted. The Texas Court of Criminal Appeals denied the application without written order on March 31, 2004.

Tex. R. App. P. 42.2 provides in relevant part:

"44.2. Reversible Error in Criminal Cases

(a) *Constitutional Error.* If the appellate record in a criminal case reveals constitutional error that is subject to harmless error review, the court of appeals
must reverse a judgment of conviction or punishment unless the court determines beyond a reasonable doubt that the error did not contribute to the conviction or punishment.

(b) *Other Errors.* Any other error, defect, irregularity, or variance that does not affect substantial rights must be disregarded."

On June 28, 2004, Richardson, proceeding with counsel, filed the instant application for writ of habeas corpus under 28 U.S.C. § 2254. He argued, *inter alia*, that the state appellate court incorrectly applied harmless error analysis, and that its finding that "a reasonable member of the public, knowing all the circumstances involved, would have questions or doubts as to the impartiality" of Judge Henry Wade, Jr. amounted to constitutional structural error, which should have resulted in automatic reversal. *See Richardson*, 83 S.W.3d at 358- 59. He also argued that the error was not harmless and that Judge Henry Wade, Jr. was actually biased.

On June 29, 2006, the magistrate judge (MJ) recommended that the district court deny Richardson's petition. The MJ determined first that Richardson failed to show that the trial judge was actually biased against him. The MJ also found that the federal due process standard for recusal was narrower than the state recusal standard applied by the Texas court of appeals. Therefore, the MJ concluded that the Texas court of appeals' finding of the appearance of bias was not entitled to deference. The MJ also concluded that, under the federal standard, there was no appearance of bias sufficient to violate the Due Process Clause, so Richardson failed to show that his trial fell within the limited class of cases representing structural error.

Over Richardson's objections, the district court adopted the MJ's recommendation and denied Richardson's petition for habeas relief on July 26, 2006. Richardson timely appealed on August 15, 2006. This court granted Richardson a certificate of appealability (COA) "on the issue whether the appearance of bias in a trial judge amounts to

structural error and whether the state appellate court's conclusion here that a reasonable person could question the trial judge's impartiality necessarily included a finding of a due process violation that should have been afforded deference."

DISCUSSION

We limit our discussion to the issues approved in the COA: (1) Whether the appearance of bias in a trial judge is a structural error that requires automatic reversal, and (2) whether the state appellate court's conclusion that Judge Henry Wade, Jr. appeared to be biased necessarily included a factual finding of a due process violation that this court should afford deference.[2] For the reasons stated below, we affirm the judgment of the district court.

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[2] Despite the fact that the Texas trial and appellate courts as well as the United States district court all found that Judge Henry Wade, Jr. was not actually biased, at several points in his brief, Richardson appears to argue that the judge was actually biased against him. He supports his argument by referring to various evidentiary rulings made by the judge, the fact that the judge raised his bond without notice, and the fact that the judge is connected to the victim through his wife. Richardson made these arguments in his COA application, but this court did not grant a COA on that issue. Because this court granted a COA only on the issue of whether the appearance of bias was a structural error, any claim of actual bias is not properly before the court. *See* § 28 U.S.C. § 2253(c); *Lackey v. Johnson*, 116 F.3d 149, 151-52 (5th Cir. 1997) (holding that review of a habeas petition is limited to the issues specified in the COA). Moreover, we think it clear that the evidence does not support, and certainly does not compel, a finding of actual bias.

A. Jurisdiction and Standard of Review

This court has jurisdiction over this habeas corpus proceeding pursuant to 28 U.S.C. § 2253(a) and (c)(1)(A). In a federal habeas corpus appeal, the district court's findings of fact are reviewed for clear error, while its conclusions of law are reviewed *de novo*. *Buntion v. Quarterman*, 524 F.3d 664, 670 (5th Cir. 2008). Because Richardson's federal petition for habeas review was filed after 1996, the district court applied the Antiterrorism and Effective Death Penalty Act (AEDPA). Under the pertinent AEDPA provision, 28 U.S.C. § 2254(d), a federal court may only grant a state prisoner's application for a writ of habeas corpus if his incarceration was the product of a state court adjudication that:

> "(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding."

This court reviews questions of law and mixed questions of law and fact under section 2254(d)(1), while it reviews questions of fact under section 2254(d)(2). *Horn v. Quarterman*, 508 F.3d 306, 312 (5th Cir. 2007) (citing *Martin v. Cain*, 246 F.3d 471, 475 (5th Cir. 2001)). The parties do not dispute the pertinent facts pertaining to Judge Henry Wade, Jr.'s interest in the case. Instead, they dispute whether, in light of these facts, Richardson's due process rights were violated. Thus, whether Richardson's due process

rights were violated is a question of law, and should be evaluated under section 2254(d)(1).

The phrase "clearly established Federal law" for the purposes of 28 U.S.C. § 2254(d)(1) refers to "the governing legal principle or principles set forth by the Supreme Court at the time the state court render[ed] its decision." *Lockyer v. Andrade*, 123 S. Ct. 1166, 1172 (2003) (quoting *Williams v. Taylor*, 120 S. Ct. 1495 (2000)). It includes the holdings, but not the dicta, of these Supreme Court opinions. *Id.*

A state court "decision is contrary to clearly established federal law 'if the state court arrives at a conclusion opposite to that reached by [the Supreme Court] on a question of law or if the state court decides a case differently than [the] Court has on a set of materially indistinguishable facts.'" *Gardner v. Johnson*, 247 F.3d 551, 557 (5th Cir. 2001) (alterations in original) (quoting *Williams*, 120 S. Ct. at 1523). Further, as we said in *Horn*, 508 F.3d at 312-13:

> "A state court's decision constitutes an 'unreasonable application' of 'clearly established Federal law, as determined by the Supreme Court,' '"if the state court correctly identifies the governing legal principle from [Supreme Court] decisions but unreasonably applies it to the facts of the particular case."' *Busby* [*v. Dretke*], 359 F.3d [708,] 713 [5th Cir. 2004] (quoting *Bell v. Cone*, 535 U.S. 685, 694, 122 S.Ct. 1843, 152 L.Ed.2d 914 (2002)). 'We *cannot* reverse the denial of habeas relief simply by concluding that the state court decision applied clearly established federal law *erroneously*,' but rather, 'we must conclude that such application was

> also *unreasonable*.' *Martin* [*v. Cain*], 246 F.3d 476 [5th Cir. 2001]; *see Neal v. Puckett*, 286 F.3d 230, 233 (5th Cir. 2002) (en banc) (per curiam) (denying habeas relief where state court's conclusion was incorrect but not unreasonable)." (footnote omitted)

As the Supreme Court recently noted in *Wright v. Van Patten*, 128 S.Ct. 743, 743 (2008), "Because our cases give no clear answer to the question presented . . . 'it cannot be said that the state court "'unreasonabl[y] appli[ed] clearly established Federal law."'" (quoting *Carey v. Musladin*, 127 S.Ct. 649, 654 (2006)).

A State court's findings of fact are presumed to be correct, and the petitioner has the burden of rebutting the presumption of correctness by clear and convincing evidence. 28 U.S.C. § 2254(e)(1). We defer to a state court's findings of fact "unless they were based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding." *Gardner*, 247 F.3d at 557 (internal quotations and citations omitted); *see also Buntion*, 524 F.3d at 670. In this case, we defer to the pertinent undisputed facts outlined in the opinion of the Texas court of appeals, though we will not draw inferences beyond these facts. *See Richardson*, 83 S.W.3d at 354-58.

Finally, under section 2254(d)(2), this court should review the "ultimate decision" of the Texas courts, not "every jot of [their] reasoning." *Santellan v. Cockrell*, 271 F.3d 190, 193 (5th Cir. 2001). Thus, instead of focusing on the reasoning of state courts in denying Richardson relief, we will focus on the outcome of their decisions.

B. Appearance of Bias

Richardson argues that Judge Henry Wade, Jr. appeared to be biased, and that an appearance of bias in a trial judge is a "structural error," a constitutional error subject to automatic reversal without the use of harmless error review. *Neder v. United States*, 119 S. Ct. 1827, 1833 (1999). Structural errors occur only in a very small class of cases, such as when a trial judge is actually biased. *Id.* (citing *Tumey v. Ohio*, 47 S. Ct. 437 (1927)). Richardson contends that, under Supreme Court precedent, both actual bias and the appearance of bias in a trial judge constitute structural errors because they both violate a defendant's due process rights. Thus, Richardson argues, the Texas court of appeals improperly applied harmless error review after finding that the trial court erred in refusing to recuse Judge Henry Wade, Jr.

Under 28 U.S.C. § 2254(d)(1), we may grant Richardson's application for a writ of habeas corpus only if his incarceration was the product of a state court adjudication that violated his clearly established rights under the Due Process Clause as they are set forth in Supreme Court precedent.[3] *Buntion*, 524 F.3d at 671 (holding that the district court erred by relying on sources outside of clearly established Supreme Court precedent and by evaluating the state judge's

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[3] The state argues that it is questionable whether Richardson adequately and timely raised federal due process arguments in his state court proceedings. Thus, it contends that Richardson did not exhaust his state court remedies on this issue. However, we need not address this argument because we deny Richardson relief regardless of whether this allegation concerning failure to exhaust is accurate.

behavior under the Texas Code of Judicial Conduct). Richardson has not alleged a violation of any other right, and we do not have jurisdiction to determine his rights under federal or state recusal statutes or ethical canons as such.[4]

Under the Due Process Clause, a criminal defendant is guaranteed the right to a fair and impartial tribunal. *Bracy v. Gramley*, 117 S. Ct. 1793, 1797(1997). The Due Process Clause "establishes a constitutional floor, not a uniform standard." *Id.* This floor requires a fair trial, "before a judge with no

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[4] Generally, the constitutional due process requirements regarding judicial impartiality are much narrower than the requirements found in recusal statutes and ethical canons. *See, e.g. United States v. Couch*, 896 F.2d 78, 81 (5th Cir. 1990) (stating that 28 U.S.C. § 455, the federal recusal statute, "establishes a statutory disqualification standard more demanding than that required by the Due Process Clause"). Thus, a violation of a state or federal statute for the failure to recuse a trial judge because certain circumstances may give rise to an appearance of bias on the part of the judge does not necessarily constitute a due process violation. In applying the due process standard for judicial recusal, we do not deny the importance of fostering an appearance of impartiality in the judiciary. *See Potashnick v. Port City Construction Co.*, 609 F.2d 1101, 1111 (5th Cir. 1980). This principle is well established in the statutes and ethical canons that govern both state and federal judges. *Id.* For example, 28 U.S.C. § 455(a) requires recusal in a proceeding where a federal judge's "impartiality might reasonably be questioned." The concern with maintaining the appearance of judicial impartiality "stems from the recognized need for an unimpeachable judicial system in which the public has unwavering confidence." *Potashnick*, 609 F.2d at 1111. However, in this case our only concern is whether the Texas court of appeals' affirmance of Richardson's conviction and sentence, despite its holding that the trial judge should have been recused, violated Richardson's federal due process rights.

actual bias against the defendant or interest in the outcome of his particular case." *Id.* (citation omitted).

However, "bias by an adjudicator is not lightly established." *Valley v. Rapides Parish Sch. Bd.*, 118 F.3d 1047, 1052 (5th Cir. 1997). Courts ordinarily "presume that public officials have properly discharged their official duties." *Bracy v. Gramley*, 117 S. Ct. at 1799 (internal quotation marks and citations omitted). General allegations of bias or prejudice are insufficient to establish a constitutional violation. *See Aetna Life Ins. Co. v. Lavoie*, 106 S. Ct. 1580, 1585 (1986) (holding that general allegations of a judge's frustration with insurance companies are not sufficient to force recusal under the Due Process Clause from a case in which an insurance company was a party). The Supreme Court has stated that "most matters relating to judicial disqualification [do] not rise to a constitutional level." *Id.* at 1584 (quoting *FC v. Cement Inst.*, 68 S. Ct. 793, 804 (1948)). So even if a judge is disqualified under state or federal law, the disqualification is not always required by the Due Process Clause. *See id.* at 1585.

In general, the Supreme Court has recognized "presumptive bias" as the one type of judicial bias other than actual bias that requires recusal under the Due Process Clause. *Buntion*, 524 F.3d at 672. Presumptive bias occurs when a judge may not actually be biased, but has the appearance of bias such that "the probability of actual bias . . . is too high to be constitutionally tolerable." *Id.* (quoting *Withrow v. Larkin*, 95 S. Ct. 1456, 1464 (1975)). The Supreme Court has only found that a judge's failure to recuse constitutes presumptive bias in three situations: (1) when the judge "has a direct personal, substantial, and pecuniary interest in the outcome of the case," (2)

when he "has been the target of personal abuse or criticism from the party before him," and (3) when he "has the dual role of investigating and adjudicating disputes and complaints."[5] *Buntion*, 524 F.3d at 672 (quoting *Bigby v. Dretke*, 402 F.3d 551, 559 (5th Cir. 2005)); *see also Crater v. Galaza*, 491 F.3d 1119, 1131 (9th Cir. 2007) (coming to the same conclusion).

This case does not come anywhere near to closely resembling the cases in which the Supreme Court has found presumptive bias. In this case, the judge's wife was an acquaintance of the victim of the crime that the defendant was accused of committing. Judge Henry Wade, Jr. did not have a pecuniary interest in the outcome of the case, was not abused or criticized by Richardson, and did not investigate and adjudicate the case. Thus, the Texas court of appeals' decision to overrule Richardson's complaint as well as the Texas

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[5] For example, in *Aetna*, the Supreme Court held that a state judge's participation in an appellate decision violated due process because the decision increased the legal status and settlement value of a case in which the judge was a party. 106 S. Ct. at 1587; *see also Ward v. Vill. of Monroeville*, 93 S. Ct. 80, 83 (1972) (mayor disqualified under the Due Process Clause from adjudicating traffic cases because the traffic fines contributed significantly to city finances); *Tumey v. Ohio*, 47 S. Ct. 437, 441 (1927) (mayor could not sit as judge in cases because he was paid more for a conviction than for an acquittal). In *Mayberry v. Pennsylvania*, 91 S. Ct. 499, 505 (1971), the Court held that it violated the Due Process Clause to allow a judge who was verbally attacked by a defendant to preside over the defendant's contempt trial because after he had been slandered by the defendant, he was not likely to be able to remain calm and detached in order to adjudicate fairly. Finally, in *In re Murchison*, 75 S. Ct. 623, 627 (1955), the Court held that a judge violated due process by acting both as a one-man grand jury and the presiding jurist at the trial of the same defendant.

Court of Criminal Appeals' decision to deny his application for habeas relief were not contrary to and did not involve an unreasonable application of "clearly established Federal law, as determined by the Supreme Court of the United States" for the purposes of 28 U.S.C. § 2254(d)(1).

Nonetheless, language in some Supreme Court opinions implies that there may be presumptive bias when a trial judge appears to be biased in situations other than those listed above. For example, the Supreme Court has indicated that recusal for the appearance of bias is required by the Due Process Clause when the situation is one "which would offer a possible temptation to the average . . . judge to . . . lead him not to hold the balance nice, clear and true." *Aetna*, 106 S. Ct. at 1585 (quoting *Ward*, 93 S. Ct. at 83); *see also Couch*, 896 F.2d at 82 ("The Due Process Clause requires a judge to step aside when a reasonable judge would find it necessary to do so."). As the Supreme Court has explained, the Due Process Clause "may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties." *Aetna*, 106 S. Ct. at 1587. Furthermore, the Supreme Court has indicated that "to perform its high function in the best way, 'justice must satisfy the appearance of justice.'" *Id.* (citing *In re Murchison*, 75 S. Ct 623, 625 (1955)).

Richardson incorrectly contends that this language from Supreme Court opinions suggests that an appearance of bias in a trial judge always amounts to presumptive bias requiring recusal. As the Seventh Circuit has explained, the Supreme Court's "'appearance of justice' language" indicates that

"judges sometimes must recuse themselves when they face possible temptations to be biased, even when they exhibit no actual bias." *Del Vecchio v. Illinois Dep't of Corr.*, 31 F.3d 1363, 1372 (7th Cir. 1994) (*en banc*). However, not all "possible temptations" toward bias require a judge to disqualify himself. *Id.* at 1374. Judge Henry Wade, Jr. did not face a significant temptation to be biased against Richardson. He did not stand to gain personally or professionally if Richardson were sentenced more harshly by the jury. It may have pleased his wife or her friends and acquaintances at the Junior League if Richardson received a harsh sentence, but this is not the type of "possible temptation" that would lead the average judge "not to hold the balance nice, clear and true." *Aetna*, 106 S. Ct. at 1585. Thus, this case does not present the situation contemplated by the Supreme Court in which a violation of due process would result when a judge was not actually biased.

More importantly, it is only *clearly established* by Supreme Court precedent that presumptive bias exists in the three circumstances discussed above. Simply attempting to apply to a particular situation such non-specific highly general *dicta* as cited by Richardson does not suffice to meet the "clearly established" standard here. *See Lockyer*, 123 S.Ct. at 1172-73. Thus, even if the appearance of bias may constitute presumptive bias and require reversal in situations other than those outlined by the Supreme Court, the Texas state courts did not improperly deny Richardson relief in violation of *clearly established* Supreme Court precedent.

Fifth Circuit case law supports our conclusion that there is no "clearly established Federal law"

supporting Richardson's argument that the appearance of bias in Judge Henry Wade, Jr. violated his due process rights, and amounted to structural error.[6] For example, in *Bradshaw v. McCotter*, 785 F.2d 1327, 1329 (5th Cir. 1986) (*Bradshaw I*), revised by *Bradshaw v. McCotter*, 796 F.2d 100 (5th Cir. 1986) (*Bradshaw II*), this court held that the presence of an appellate judge's name on the state's brief without more created an appearance of bias requiring automatic vacatur under the Due Process Clause without harmless error analysis. However, on panel rehearing, the court followed the analysis of the recently-released opinion in *Aetna* and concluded that the constitutional violation required reversal only if the appearance of bias was prejudicial. *Bradshaw II*, 796 F.2d at 101. Because the appellate judge's vote was not controlling in Bradshaw's case, Bradshaw suffered no prejudice as a result of the judge's appearance of bias. *Id.* This court held that the judge should have recused, but that his failure to do so did not amount to a due process violation. *Id.* Thus, *Bradshaw II* suggests that the appearance of bias in a trial judge does not *per se* amount to a due process violation or a structural error.

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[6] Richardson cites two irrelevant Fifth Circuit cases in support of his argument that the appearance of bias constitutes structural error, *Republic of Panama v. American Tobacco Co.*, 217 F.3d 343 (5th Cir. 2000), and *United States v. Anderson*, 160 F.3d 231 (5th Cir. 1998). Neither of these cases addresses the due process standard for judicial disqualification. They apply the standard for judicial recusal under the federal recusal statute, 28 U.S.C. § 455. *Republic of Panama*, 217 F.3d at 346; *Anderson*, 160 F.3d at 233. Thus, these cases have no bearing on this case, and do not support Richardson's arguments.

This court came to a similar conclusion in *Couch*, 896 F.2d 78. In *Couch*, we analyzed whether an appearance of judicial bias, without a claim of actual bias, warranted a claim for habeas relief under 28 U.S.C. § 2255.[7] 896 F.2d at 80. The petitioner claimed that his trial judge created an appearance of partiality in violation of the Due Process Clause and the federal recusal statute, 28 U.S.C. § 455, because he did not disclose that he invested money in an unsuccessful oil drilling venture with the defendant and that he shared leasehold rights with the defendant's children in an oil and gas lease. *Id.* at 79. This court emphasized that section 455 establishes a *more* demanding standard than the Due Process Clause because it involves the "additional, systemic concern for avoiding the appearance of impropriety." *Id.* at 82. It held that the Due Process Clause did not require vacatur of the defendant's sentence based on the connections between the trial judge and the defendant that may have created the appearance of partiality. *Id.* Thus, *Couch* supports the conclusion that the appearance of bias in a judge does not necessarily amount to presumptive bias.

However, Richardson cites one Seventh Circuit case that provides some support for his argument. In *Franklin v. McCaughtry*, 398 F.3d 955, 960 (7th Cir. 2005), the Seventh Circuit reviewed a Wisconsin state court decision rejecting the defendant's challenge to the partiality of the trial judge because he failed to

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[7] Section 2255 allows a federal prisoner to file an application for federal habeas corpus relief. It does not establish the same standard of review set forth in section 2254(d), which applies to *state* prisoners filing federal habeas applications.

show actual bias. The state court's recusal test, like the test applied by the Texas appellate court here, included first an objective examination of whether a reasonable person could question the judge's impartiality and, second, an analysis of whether this error was harmless. *Id.* Citing *Bracy v. Schomig*, 286 F.3d 406, 410-11 (7th Cir. 2002) (en banc), the Seventh Circuit held that the state's test was contrary to clearly established federal law because both actual bias and the appearance of bias in a trial judge violate a defendant's due process rights, and both are considered structural errors subject to automatic reversal. *Franklin*, 398 F.3d at 960-61. In *Bracy*, the Seventh Circuit stated in dicta that the pertinent Supreme Court cases "tell us that ordinarily 'actual bias' is not required, the appearance of bias is sufficient to disqualify a judge." 286 F.3d at 411. However, this is not necessarily an accurate statement of the law. In 1994, the Seventh Circuit actually held in *Del Vecchio* that the mere appearance of impropriety in a judge does not necessarily render a judgment in violation of due process. *Del Vecchio*, 31 F.3d at 1371-72 ("[T]he Supreme Court's mention of 'appearance of justice' certainly does not compel reversal on due process grounds if a federal judge decides—based on a personal view of judicial protocol—that it looked bad for a state judge to try a case.").

Further, the *Franklin* court did not rest its holding solely on its conclusion that the appearance of bias in a trial judge violates a defendant's due process rights. Its conclusion that a due process violation had occurred was also (indeed apparently primarily) based on a determination that the judge was *actually* biased. 398 F.3d at 961, 962 (concluding "in the alternative

that the Wisconsin Court of Appeals unreasonably determined that [the judge] was not actually biased," and ultimately holding that "[b]ecause [the judge] was actually biased, [the defendant] is entitled to a new trial"). Thus, *Franklin* is an unreliable guide in this case because it is factually distinguishable (as actual bias was shown) and in other respects seems in some tension with its own circuit's precedents. Furthermore, it is not binding precedent for this court, and is contrary to the holdings of this circuit as in *Couch*.

A number of other cases from our sister circuits have held that there is no "clearly established Federal law, as determined by the Supreme Court" for the purposes of 28 U.S.C. § 2254(d)(1) that establishes presumptive bias and requires automatic recusal of a judge under the Due Process Clause in cases of a mere appearance of judicial bias alone. *See, e.g., Davis v. Jones*, 506 F.3d 1325, 1333 (11th Cir. 2007) (holding that "none of the Supreme Court cases relied upon by [the defendant] establishes that an appearance [of judicial bias] violates the Due Process Clause"); *Welch v. Sirmons*, 451 F.3d 675, 700 (10th Cir. 2006) (holding that Supreme Court case law has not held, or even pronounced in dicta, that the mere appearance of bias in a state trial judge violates the Due Process Clause); *Johnson v. Carroll*, 369 F.3d 253, 263 (3rd Cir. 2004) (holding that "the Supreme Court's case law has not held, not even in dicta, let alone 'clearly established,' that the mere appearance of bias on the part of a state trial judge, without more, violates the Due Process Clause"); *United States v. Lowe*, 106 F.3d 1498, 1504 (10th Cir. 1997) ("To state a due process claim that a judge was biased, defendant must show either that actual bias existed, or that an appearance of bias created a conclusive presumption of actual bias."); *Del*

Vechhio, 31 F.3d at 1371-72 (Seventh Circuit holding that the "Supreme Court has never rested the vaunted principle of due process on something as subjective and transitory as appearance"). These cases have recognized that the Supreme Court does not require reversal of a defendant's case on due process grounds merely because a judge may have appeared to be biased.

For the reasons stated above, as to the first issue certified on appeal, we hold that the district court correctly concluded that it was not a federal due process violation or federal constitutional structural error, for the Texas courts to refuse to grant Richardson a new trial based on the appearance of bias in Judge Henry Wade, Jr. There is no clearly established law determined by the Supreme Court indicating that the mere appearance of bias in a trial judge such as to mandate recusal under state law constitutes a violation of the Due Process Clause, and requires automatic reversal in a case like Richardson's. Therefore, the Texas courts' decisions denying Richardson relief on his judicial recusal claim were not "contrary to," and did not involve an "unreasonable application of[] clearly established Federal law, as determined by the Supreme Court." 28 U.S.C. § 2254(d)(1).

C. Deference to the Texas Court of Appeals

Richardson asks this court to defer to the Texas appellate court's finding that Judge Henry Wade, Jr. should have been recused under Texas law because "the undisputed evidence" showed that "a reasonable member of the public, knowing all the circumstances involved, would have questions or doubts as to the

impartiality of the trial judge." *Richardson*, 83 S.W.3d at 358-59. He argues that the district court failed to recognize that this "finding" by the state appellate court necessarily included a finding of a due process violation. However, the Texas Court of Appeals in *Richardson* based its recusal holding entirely on "undisputed facts," it made no finding on any disputed historical facts, and essentially simply made a legal determination, not a fact finding, that on those undisputed facts Texas law mandated recusal.

The Texas Court of Criminal Appeals has stated that bias "may be a ground for disqualification only when it is shown to be of such nature, and to such extent, as to deny the defendant due process of law." *Kemp v. State*, 846 S.W.2d 289, 305 (Tex. Crim. App. 1992) (*en banc*). Under *Kemp*, a state court deciding a recusal question based on bias "must decide whether the movant has provided facts sufficient to establish that a reasonable man, knowing all the circumstances involved, would harbor doubts as to the impartiality of the trial judge." *Id.* However, as we expressly said in *Couch*, the section 455 recusal standard (similar to the *Kemp* standard) of "where others would have reasonable cause to question the judge's impartiality" is "*more demanding* than that imposed by the due process clause" which we described, relying on the Supreme Court's opinion in *Aetna*, as being "when a reasonable judge would find it necessary to do so." *Couch* at 82 (emphasis added).

The district court correctly concluded that it need not defer to the state court's decision because the due process standard differs from the recusal standard applied by the Texas appellate court. The state appellate court made the required determination

under *Kemp*. *Richardson*, 83 S.W.3d at 358-59. However, this does not indicate that the state court also necessarily made a factual finding of a federal due process violation. As noted, the court merely made a determination of the legal consequence of the undisputed facts, not a factual finding. And, it expressly stated there was no finding of actual bias, prejudice or partiality. The Texas court of appeals did not mention the Due Process Clause of the federal constitution in its opinion, and did not apply a federal constitutional standard in determining whether Judge Henry Wade, Jr. should have been recused. As the state court applied a more demanding standard in its recusal holding than this court must apply in determining whether Richardson's federal due process rights were violated by Judge Henry Wade, Jr.'s having presided at the trial, we hold that as to the second issue certified on appeal, the decision of the Texas court of appeals did not necessarily include a *factual* finding of a federal due process violation, and that this court owes it no deference with respect to the federal due process claim.

Moreover, and in any event, our concern under section 2254(d) is with the actual facts determined by the state court and the "ultimate decision" of the state court, and not with "every jot of [their] reasoning." *Santellan*, 271 F.3d at 193, 194. We accept *all* the *facts* reflected in the Texas Court of Appeals' opinion in *Richardson* respecting Judge Henry Wade, Jr.'s relationship to, participation in and conduct concerning the case.[8] The only question then becomes,

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[8] We view the Texas court of appeals' determination that from the recited "undisputed" facts "a reasonable member of the public,

under section 2254(d), whether on those facts the Texas appellate court's decision, that Judge Henry Wade, Jr.'s presiding at the trial (over Richardson's timely objection) did *not* entitle Richardson to a new trial (where, it found beyond a reasonable doubt, there was no prejudice), constitutes a "decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." We hold that *that* decision does *not* meet *that test*. The Texas appellate court's implied intermediate steps of legal reasoning are ultimately irrelevant to our said holding.

CONCLUSION

For the foregoing reasons, the judgment of the district court denying Richardson's application for writ of habeas corpus is

AFFIRMED.

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knowing all the circumstances involved, would have questions or doubts as to the impartiality of the trial judge," as being, if not simply a legal conclusion, then at the most being a mixed question of law and fact reviewed de novo under § 2254(d)(1). *See Horn*, 508 F.3d at 312. The underlying, historic facts recited by the Texas court of appeals are all accepted by us as accurate.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS DALLAS DIVISION

NO. 3:04-CV-1396-N

[Filed June 29, 2006]

PATRICK TIMOTHY RICHARDSON,	)
	)
Petitioner,	)
	)
VS.	)
	)
DOUGLAS DRETKE, Director Texas Department of Criminal Justice, Correctional Institutions Division,	)
	)
Respondent.	)
	)

FINDINGS, CONCLUSIONS AND RECOMMENDATION OF THE UNITED STATES MAGISTRATE JUDGE

This case has been referred to the United States Magistrate Judge pursuant to 28 U.S.C. § 636(b) and a standing order of reference from the district court. The Findings, Conclusions and Recommendation of the Magistrate Judge are as follows:

I. Procedural Background

Petitioner filed this petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. On May 7, 2000, Petitioner pled guilty to murder. *State of Texas v. Patrick Timothy Richardson*, No. F-0000766-NV (292nd Dist. Ct., Dallas County, Tex., May 7, 2000). The jury assessed punishment at sixty years imprisonment.

On August 1, 2002, the Thirteenth District Court of Appeals affirmed Petitioner's conviction. *Richardson v. State*, 83 S.W.3d 332 (Tex. App. – Corpus Christi 2002). On March 19, 2003, the Texas Court of Criminal Appeals denied Petitioner's petition for discretionary review. *Richardson v. State*, P.D.R. No. 1702-02.

On December 22, 2003, Petitioner filed a state petition for writ of habeas corpus. *Ex parte Richardson*, Application No. 58,297-01. On March 31, 2004, the Court of Criminal Appeals denied the petition without written order.

On June 28, 2004, Petitioner filed this federal petition. He argues he was denied due process when his motion to recuse the trial judge was denied.

II. Factual Background

The following factual background is taken from the opinion of the Thirteenth District Court of Appeals.

> Richardson argues in issue seven that the trial court erred by denying his motion to recuse. He alleged the trial judge should have recused because his impartiality my reasonably

be question or because he had a person bias or prejudice concerning the subject matter or a party. . . .

The presiding judge of the First Administrative Region resided at the motion to recuse. Connie O'Neil, who recently had been president of the Junior League of Dallas, a volunteer organization of approximately 5600 members, testified that both the deceased and the judge's wife were members of the League and members of its leadership council. She indicated that the council, which consisted of 40-42 members, met seven or eight times between June 1, 1998, to May 31, 1999. While O'Neil could not say how many of those meetings were attended by the deceased and Judge Kristin Wade, the judge's wife, she testified that they worked together during those meetings on at least a few occasions. She characterized the meetings, which would last from forty-five minutes to as long as an hour and a half, as more a presentation and agenda than a gathering where everyone would visit with everyone else. O'Neil related that the deceased and Judge Kristin Wade did not serve on any other committee. The League president described both the deceased and Judge Kristin Wade as active members of the League. O'Neil also testified that on December 6, 1998, both Judge Henry Wade, Jr., the trial judge, and his wife and Richardson and the deceased had attended a party at her home. O'Neil identified several women as members or former members of the Junior League of Dallas.

Judge Kristen Wade testified that she had known the deceased through the Junior League of Dallas, and that they both had served on the leadership council during the prior club year. She indicated that she would classify the deceased as more of an acquaintance than a friend. She said they knew each other by sight and exchanged pleasantries when they saw each other. She related that they did not engage in personal conversation, but definitely engaged in Junior-League type conversation. She stated that she did not know such personal details as the number or names of the Richardson children. She acknowledge having talked to the deceased on occasions other than leadership council meetings and that their relationship was a little more than someone meeting for the first couple of times. She testified that she and the deceased attended most of the meetings of the leadership council. She acknowledged that because of the group's size it was sometimes hard to keep track as to who was there. Judge Kristin Wade testified that she recalled the deceased having been at the December 1998 party at the home of Connie O'Neil, and that although she could not recall Richardson being there, he probably was and it was likely that both she and her husband met him.

Judge Kristen Wade testified that a member of the Junior League called her the evening of the murder, telling her of the death and saying that she thought Richardson killed her. She related that at the time of the call, her husband, Judge Henry Wade, Jr., asked who had called, but she was too busy putting their children to

bed to answer. She later told him that she had received a call from a friend informing her that another girl she knew had been killed. When her husband asked if he knew the deceased, she told him her name, but he again asked whether he knew her. Judge Kristin Wade indicated that she told him she did not know if he did or not. She stated that after seeing pictures of the deceased on the evening news, her husband stated that he did not recognize her. She acknowledged that she recognized the deceased.

Judge Kristin Wade testified she received several phone calls the next day after Richardson was released on bond, all from members of the Junior League. She related that the callers were unhappy, wanting to know how a bond works, how bond is set. She indicated that she might also have received calls the following day. She remembered that Connie O'Neil, the immediate past president of the Junior League, had called her at some point about the case. She recalled a total of about five or six calls. She said it would be a fair assessment that the callers were upset that Richardson was out on bond.

Judge Kristin Wade testified that on Monday, before getting the calls, while on their way to work, she asked her husband what he thought about the bond and he thought that the information on the news might have been incorrect in that it could have been a cash bond instead of a surety bond. She denied that they discussed whether the bond amount was set too high or too low.

Judge Kristin Wade testified that her husband had been in attendance with her at Junior League functions to which spouses were invited. She indicated that there were only one or two such events per year.

Judge Kristin Wade acknowledged that on Monday, the day after the murder, she contacted Judge King, the judge who had set Richardson's bond, and Ms. Dyer, an assistant district attorney, concerning the bond. She said both contacts were in the nature of seeking information so that she could accurately answer the callers' questions and know where to refer them. She acknowledged that she was trying to direct her friends who were upset about the bond to Ms. Dyer so she could file a motion to raise the bond if she chose to do so. She insisted that Ms. Dyer had already filed such a motion at the time she talked to her. She again acknowledged that some of the callers were outraged about the bond.

Judge Kristen Wade acknowledged that she attended the deceased's funeral, which she indicated was attended by a lot of people, including members of the Junior League. She also indicated that the previous evening she had told her husband of her plans to attend the funeral. She related that she attended a reception after the funeral at the headquarters of the Junior League. She stated that the general consensus of those with whom she talked there was that they were outraged that Richardson was on bond. She recalled having spoken with O'Neil and two others. She

subsequently testified that she did not really know that there was much conversation about the bond at the reception. She affirmed the fact that her husband knew from the news that there were some people outraged about the amount of the bond. She acknowledged that her husband was aware that she had attended both the funeral and the reception.

Judge Kristen Wade testified that she disagreed with the amount of the bond Judge King set, but that she did not relate that to him. She indicated that she and her husband did not ride together to work on the day the case was assigned to him. She related that she thought her husband already knew, before he was assigned to the case, that the State had already filed a motion to raise the bond.

Judge Kristen Wade acknowledged that several of those previously identified by O'Neil as being affiliated with the Junior League had made contributions to her March 1998 primary election campaign. She denied that any of them were among those who had called her. She said that she did not recall one of her campaign signs having been in the Richardson's yard, but that she would not be surprised if one had been there.

Judge Kristen Wade insisted that after the case was assigned to her husband she called the Junior League headquarters and talked "to Connie O'Neil and/or Helen Holman," telling them not to call her and not to have anyone else call her because she could not talk about the

case anymore. She indicated that she received no more angry phone calls after that.

Judge Kristin Wade insisted that she only knew the deceased through the Junior League; that they had never been in each other's homes; that she had never had lunch with the deceased; and that she did not know the number or names of the deceased's children. She related that neighbors also asked her about the bond because of all the publicity about it. She said that she tried to distance herself from her husband regarding the case. She said she had received campaign contributions from people who were not in the Junior League, and that the deceased, to her knowledge, had not contributed to either her or her husband's campaign. She acknowledged that someone could contribute to a campaign in non-monetary ways, such as having a yard sign in their yard. She said that she did not think that she had ever discussed with her husband that their neighbors were unhappy with the bond situation.

Judge Henry Wade, Jr., the trial judge, testified that he is the husband of Judge Kristin Wade. He indicated that on the night of the murder he learned from his wife of the murder and that the deceased had been a member of the Junior League. He said that he learned, before the case was assigned to him, that his wife had received calls from someone in the Junior League who was unhappy about the bond situation. He related that he might have met the Richardsons at the party at the home of O'Neil, but that he did not recall it. He denied

knowing any of the deceased's family. He said he was aware that his wife knew the deceased through the Junior League, but was not aware that it was through the leadership council.

Judge Henry Wade, Jr., testified that he was aware that his wife had attended both the funeral and the reception and he (sic) that he recalled a conversation that occurred before he took over the case about someone in the Junior League being unhappy about the bond. He indicated he was "kind of" aware that it was more than one person, although he was not aware of specific names. He related that when Ms. Dyer presented him with a motion to raise the bond prior to the case being assigned to him, as a matter of courtesy he discussed the matter with Judge King as to what he should do and they agreed he would do nothing. He acknowledged having seen press reports concerning public outrage about the amount of the bond. He said that his wife let him know she disagreed with the amount of the bond. He acknowledged that the morning the case was assigned to him he granted a State's motion to declare Richardson's bond insufficient and raised it from $30,000 to $1,000,000, in the absence of Richardson's attorney and without a hearing, although he knew Richardson was represented by counsel. He related that it was represented to him that a copy of the motion had been faxed to Richardson's attorney.

Judge Henry Wade, Jr., testified that he only knew his wife's Junior League friends casually. He said he did not know the deceased, was not

> a friend of hers or of Richardson, and the fact that the deceased and his wife had both been members of the Junior League would not influence his decision in the case.
>
> . . . .

Richardson v. State, 83 S.W.3d 332, 354-358 (Tex. App. – Corpus Christi 2002).

III. Discussion

1. Standard of Review

The pertinent terms of the Antiterrorism and Effective Death Penalty Act of 1996 (the AEDPA), 28 U.S.C. § 2254 provide:

> (d) An application for writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a state court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –
>
> > (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
> >
> > (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in a State court proceeding.

See 28 U.S.C. § 2254(d). Under the "contrary to" clause, a federal habeas court may grant the writ of

habeas corpus if the state court arrives at a conclusion opposite to that reached by the United States Supreme Court on a question of law or if the state court decides a case differently from the United States Supreme Court on a set of materially indistinguishable facts. *Williams v. Taylor*, 529 U.S. 362, 380-84 (2000). Under the "unreasonable application" clause, a federal court may grant a writ of habeas corpus if the state court identifies the correct governing legal principle from the United States Supreme Court's decisions, but unreasonably applies that principle to the facts of the prisoner's case. *Id.*

This amendment applies to all federal habeas corpus petitions which are adjudicated on the merits in state court after April 24, 1996. *See Lindh v. Murphy*, 521 U.S. 320, 336 (1997). The petition in this case is subject to review under the AEDPA.

2. Motion to Recuse

Petitioner argues he was denied due process when his motion to recuse Judge Wade was denied. He argues Judge Wade was actually biased against him, and that there was an appearance of bias that violated his due process rights.

Under the Due Process Clause, a criminal defendant is guaranteed the right to a fair and impartial tribunal. *Bracy v. Gramley*, 520 U.S. 899, 904-05 (1997); *Nethery v. Collins*, 993 F.2d 1154, 1157 (1993). The Due Process Clause establishes a constitutional floor, not a uniform standard. *Bracy*, 520 U.S. at 904-05. This floor "clearly requires a 'fair trial in a fair tribunal,' before a judge with no actual bias against the defendant or interest in the outcome

of his particular case." *Id.* at 905 (citation omitted). Further, "adjudication before a biased trial judge falls within the 'very limited class of cases' that represent 'structural' error subject to automatic reversal." *Bigby v. Dretke*, 402 F.3d 551, 559 (5th Cir. 2005), *cert. denied*, 126 S.Ct. 239 (2005) (quoting *Neder v. United States*, 527 U.S. 1, 7-8 (1999)).

To establish a due process violation, a petitioner must show that a genuine question exists regarding the judge's impartiality. *Bigby*, 402 F.3d at 559, (citing *Liteky v. United States*, 510 U.S. 540, 552 (1994)). The Court must determine whether the "situation is one 'which would offer a possible temptation to the average . . . judge to . . . lead him not to hold the balance nice, clear and true.'" *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 822 (1986) (quoting *Ward v. Village of Monroeville*, 409 U.S. 5760 (1972).

The Supreme Court has stated, however, that "most matters relating to judicial disqualification [do] not rise to a constitutional level." *Aetna*, 475 U.S. at 820 (quoting *F.T.C. v. Cement Institute*, 333 U.S. 683 (1948)). Further, courts ordinarily "presume that public officials have properly discharged their official duties." *Bracy*, 520 U.S. at 909 (internal quotation marks and citations omitted). Therefore, "bias by an adjudicator is not lightly established." *Valley v. Rapides Parish Sch. Bd.*, 118 F.3d 1047, 1052 (5th Cir. 1997).

The Supreme Court's cases requiring disqualification have all involved "direct, personal [and] substantial" influences on the judges involved. *Aetna*, 475 U.S. at 822 (quoting *Tumey v. Ohio*, 273 U.S. 510, 523 (1927)). In *Tumey*, the judge in a

criminal case was paid only if the defendant was convicted. *Tumey*, 273 U.S. at 520. In *Aetna*, Justice Embry of the Alabama Supreme Court cast the deciding vote and wrote the majority opinion in a case establishing a legal proposition that "had the clear and immediate effect of enhancing both the legal status and settlement value" of two pending cases Justice Embry had filed as a plaintiff. *Aetna*, 475 U.S. at 822-24.

In *Ward v. City of Monroeville, Ohio*, 409 U.S. 57 (1972), the Court held that the mayor of Monroeville could not sit as a judge in traffic court. The mayor was responsible for the town's finances and revenue production. Monroeville derived a major part of its income from fines and other costs imposed in the court. The Court found that the mayor's responsibility for town finances "may make him partisan to maintain the high level of contribution from the mayor's court." *Id.* at 60.

The Supreme Court has also required disqualification because of a party's direct personal insults to a judge. In *Mayberry v Pennsylvania*, 400 U.S. 455 (1971), the defendant called the judge a "dirty [S.O.B.]," a "dirty tyrannical old dog," and a "fool," and told the judge to "Go to hell." *Id.* at 466. The Supreme Court held that the judge could not preside over the defendant's subsequent contempt trial.

In *In re Murchison*, 349 U.S. 133 (1955), the Court held that due process is violated where a judge acts as both a prosecutor and a judge in the same case. In that case, a state court judge acted as a "one-man grand jury" investigating police corruption. Two witnesses testified before the judge in his role as grand juror.

Based on their testimony, the judge believed the two witnesses had committed contempt. The judge then charged the two witnesses with contempt and later tried and convicted them. *In re Murchison*, 349 U.S. at 134-35. The Supreme Court held that a trial before the same judge who brought the contempt charges violated the defendants' right to due process. *Id.* at 137-139.

The United States Supreme Court, therefore, has found that decision makers are constitutionally unacceptable when: (1) the decision maker has a direct personal, substantial, and pecuniary interest in the outcome of the case; (2) an adjudicator has been the target of personal abuse or criticism from the party before him; and (3) a judicial or quasi judicial decision maker has the dual role of investigating and adjudicating disputes and complaints. *Bigby*, 402 F.3d at 559 (citations omitted).

On the other hand, not all "possible temptations" towards bias require that a judge be recused. In *Aetna*, the Court held that Justice Embry's general frustration with insurance companies did not require him to recuse. *Aetna*, 475 U.S. at 820-21. Additionally, six other state justices in *Aetna* were Blue Cross insurance subscribers and could have been part of a then pending class action against Blue Cross. The Court found that these justices had no knowledge of the class action at the time of the decision, although they did know of the action when they denied the motion for rehearing. The Court found that such an interest was not sufficiently "direct, personal, substantial [and] pecuniary" to require recusal. *Id.* at 826 (citations omitted).

(A) Actual bias

In this case, Petitioner argues that Judge Wade was required to recuse for actual bias under "*Tumey* and its progeny." (Pet. Memo at 13). In *Tumey*, as discussed above, the judge in a criminal case was paid only if the defendant was convicted. *Tumey*, 273 U.S. at 520. The interest in *Tumey*, therefore, was a pecuniary interest. Petitioner claims that, in this case, although the "interest is not pecuniary gain it was certainly well within that type of interest contemplated by *Ward*." (Pet. Mem. at 13). In *Ward*, discussed above, the Supreme Court held that the mayor of Monroeville could not sit as a judge in traffic court. *Ward*, 409 U.S. at 60. The Court found that the mayor's responsibility for town finances "may make him partisan to maintain the high level of contribution from the mayor's court." *Id.* Petitioner does not identify the interest that Judge Wade allegedly had in Petitioner's punishment trial, nor does he explain how Judge Wade's presiding over the punishment trial was "within the type of interest contemplated by *Ward*."

Petitioner does, however, object to certain evidentiary rulings made by Judge Wade. The Court must examine Petitioner's claims for a showing of actual bias. *Bigby*, 402 F.3d at 560. Petitioner argues Judge Wade showed bias in overruling defense objections to certain testimony. To establish that Judge Wade was actually biased, Petitioner must show that Judge Wade was "acting clearly outside the bounds of law or reason in a manner that would signal any bias toward the defendant." *Id.* at 563.

1. Evidentiary rulings upheld on direct appeal

Petitioner argues the following evidentiary rulings establish Judge Wade's bias. First, Petitioner states the prosecutor asked the state's psychiatrist, Dr. Benedek, to give her opinion whether the killing resulted from sudden passion arising from an adequate cause. (Trial Tr. Vol. 10, at 84, 112). Defense counsel objected, arguing that Texas Rule of Evidence 704 does not allow a witness to testify to an ultimate issue. Judge Wade overruled the objection.

Texas Rule of Evidence 704 states: "Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." On direct appeal, the court rejected Petitioner's claim, finding that the question "embraced the ultimate issue to be decided but did not answer the ultimate issue for the jury." *Richardson*, 83 S.W.3d at 350.

In Petitioner's second claim, Dr. Benedek testified that one of the reasons Petitioner murdered his wife was jealousy and jealousy regarding money. (Trial Tr. Vol. 10 at 83-84). Dr. Benedek stated her opinion was based in part upon statements one of the children made to her that his father was jealous of his mother, and that his mother had more money. (*Id.* at 62, 99-100). Defense counsel objected that Dr. Benedek's testimony was inadmissible hearsay under Texas Rule of Evidence 703. (*Id.* at 84). On direct appeal the court rejected Petitioner's claim. The court stated:

> Rule 703 of the Texas Rules of Evidence provides that facts or data in the particular case upon which an expert bases an opinion or

> inference may be those perceived by, reviewed by, or made known to the expert at or before the hearing, and that if of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

Richardson, 83 S.W.3d at 351. The court therefore found that Judge Wade properly overruled Petitioner's hearsay objection.

Petitioner has failed to show that Judge Wade's rulings were outside the bounds of law or reason. In fact, Petitioner states the rulings were "within the zone of reasonable disagreement." (Pet. Mem. at 11). Such a showing is insufficient to support a finding of actual bias.

2. Evidentiary rulings found improper on appeal

Petitioner raises two evidentiary rulings that the appellate court found were improper. In the first ruling, Dr. Benedek testified that one of the children told her his mother was "tackled" by his father just prior to the murder. (Trial Tr. Vol. 10 at 111). Petitioner raised a hearsay objection, which Judge Wade overruled. (*Id.*) The appellate court found that defense counsel's objection should have been sustained. *Richardson*, 83 S.W.3d at 352. The court, however, found the same testimony was later admitted without objection. It therefore overruled Petitioner's claim. (*Id.*)

In the second ruling, the court considered testimony from the deceased's brother, Robert

Williams. Williams testified that on the Thursday before the murder, the deceased told him that her main concern was what Petitioner would do to her and the children after the divorce. (Trial Tr. Vol. 10 at 79). Defense counsel objected that the testimony was hearsay and Judge Wade overruled the objection. (*Id.*) The court of appeals found that the trial court abused its discretion in overruling the objection, but found that:

> Given all of the evidence in this case, including the fact that it is undisputed that Richardson brutally murdered the deceased in front of their children, we hold beyond a reasonable doubt that any error in admission of the deceased's concern as to what Richardson might do to her and the children did not contribute either to his conviction or his punishment.

Richardson, 83 S.W.3d at 353.

The Court finds these two instances of hearsay evidence do not establish that Judge Wade was actually biased against Petitioner. Petitioner has not shown that Judge Wade was "acting clearly outside the bounds of law or reason in a manner that would signal any bias toward the defendant." *Bigby*, 402 F.3d at 563. He has also failed to show that a genuine question exists as to Judge Wade's impartiality. The Court finds Petitioner's due process claims based on actual bias should be denied.[1]

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[1] The appellate court's finding regarding actual bias states: "Our opinion does not constitute a finding that there was any actual bias, prejudice, or partiality on the part of Judge Henry Wade, Jr."

(B) The Appearance of Bias

Petitioner argues that Judge Wade's failure to recuse created the appearance of bias, which violated his due process rights. To support his claim, Petitioner cites the state appellate court's finding that:

> Richardson has produced undisputed evidence that would show that a reasonable member of the public, knowing all the circumstances involved, would have questions or doubts as to the impartiality of the trial judge.

Richardson, 83 S.W.3d at 358-59. He argues that once the state court found this appearance of bias, it should have found structural error and reversed the sentence. *See Bigby v. Dretke*, 402 F.3d at 559 ("adjudication before a biased trial judge falls within the 'very limited class of cases' that represent 'structural' error subject to automatic reversal.") (citation omitted). Instead, the court applied a harmless error analysis and denied relief.

Although the appellate court correctly analyzed Petitioner's claims under state law, it did not address Petitioner's claims under the federal Due Process Clause.[2] The Due Process Clause "may sometimes bar

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Richardson, 83 S.W.3d at 359. It is unclear whether the court found that Judge Wade was not actually biased, or whether the court made no finding as to this issue. Under either the AEDPA deferential review standard, or a *de novo* review, however, the Court concludes there was no showing of actual bias.

[2] The Court notes that Petitioner did not clearly raise a federal due process claim on direct appeal. He did, however, raise this

trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties." *Aetna*, 475 U.S. at 825. As the Fifth Circuit has stated, however, a trial judge with no actual bias may be barred "[s]ometimes, of course, but not always." *United States v. Couch*, 896 F.2d 78, 82 (5th Cir. 1990).

In *Couch*, the Fifth Circuit analyzed whether an appearance of judicial bias, without a claim of actual bias, stated a claim for habeas relief under 28 U.S.C. § 2255. In that case, the petitioner brought a claim under the Due Process Clause and the federal recusal statute found at 28 U.S.C. §455.

The Court stated that the Due Process Clause and section 455 are not coterminous. *Couch*, 896 F.2d at 81. Section 455, like the standard used by the state appellate court in this case, requires disqualification when others would have reasonable cause to question the judge's impartiality. *Id.* at 82. The Due Process Clause, however, "requires a judge to step aside when a *reasonable judge* would find it necessary to do so." *Id.* (emphasis added). The Court therefore stated:

> [S]ection 455 establishes a statutory disqualification standard more demanding than that required by the Due Process Clause. (citations omitted).
>
> . . . .

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claim in his motion for rehearing, petition for discretionary review and on state habeas review.

> Section 455 requires disqualification when others would have reasonable cause to question the judge's impartiality. It is this additional, systemic concern for avoiding the appearance of impropriety that makes the section 455 standard for disqualification more demanding than that imposed by the Due Process Clause.

Id. at 81-82.

In this case, therefore, the appellate court applied a state recusal standard that was more expansive than that required by the Due Process Clause. Since this state law is contrary to clearly established federal law, the state court's decision finding an appearance of impropriety is not entitled to deference under the AEDPA. 28 U.S.C. § 2254(d); *Williams*, 529 U.S. at 380-84.

Applying the federal due process standard, the Court finds no appearance of bias sufficient to violate the Due Process Clause. The Court finds that a reasonable judge would not have found it necessary to recuse under the facts of this case. Further, Petitioner has shown no interest sufficiently direct, personal, substantial or pecuniary to require recusal. Petitioner has failed to show a violation of his due process rights. He has therefore failed to establish that his trial "falls within the 'very limited class of cases' that represents a 'structural' error subject to automatic reversal." *Bigby*, 402 F.3d at 559 (citation omitted).

RECOMMENDATION

This Court recommends that the petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 be DENIED.

Signed June 29, 2006.

/s/ _____
PAUL D. STICKNEY
UNITED STATES MAGISTRATE JUDGE

INSTRUCTIONS FOR SERVICE AND NOTICE OF RIGHT TO OBJECT

The United States District Clerk shall serve a copy of these findings and recommendations on the parties. Pursuant to 28 U.S.C. § 636(b)(1), any party who desires to object to these findings and recommendations must file and serve written objections within ten (10) days after being served with a copy. A party filing objections must specifically identify those findings and recommendations to which objections are being made. The District Court need not consider frivolous, conclusory or general objections. The failure to file such written objections to these proposed findings and recommendations shall bar that party from a *de novo* determination by the district court. *See Thomas v. Arn*, 474 U.S. 140, 150 (1985). Additionally, the failure to file written objections to proposed findings and recommendations within ten (10) days after being served with a copy shall bar the aggrieved party from appealing the factual findings and legal conclusions of the Magistrate Judge that are accepted by the District Court, except upon grounds of

plain error. *See Douglass v. United Servs. Auto. Ass'n*, 79 F.3d 1415, 1417 (5th Cir. 1996) (en banc).

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS DALLAS DIVISION

NO. 3:04-CV-1396-N

[Dated July 26, 2006]

PATRICK TIMOTHY RICHARDSON,

Petitioner,

VS.

DOUGLAS DRETKE, Director Texas Department of Criminal Justice, Correctional Institutions Division,

Respondent.

ORDER

After making the review required by 28 U.S.C. § 636(b), the Court finds that the Findings, Conclusions and Recommendation of the Magistrate Judge are correct, and they are adopted as the findings and conclusions of the Court.

Signed July 26, 2006.

/s/_____
David C. Godbey
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

NO. 3:04-CV1396-N

[Dated July 26, 2006]

PATRICK TIMOTHY RICHARDSON,)
)
Petitioner,)
)
VS.)
)
DOUGLAS DRETKE, Director)
Texas Department of Criminal)
Justice, Correctional Institutions)
Division,)
)
Respondent.)
)

JUDGMENT

The Court has entered its Order accepting the Findings, Conclusions and Recommendation of the United States Magistrate Judge in this case.

It is therefore ORDERED, ADJUDGED and DECREED that Petitioner's writ of habeas corpus pursuant to 28 U.S.C. § 2254 is denied with prejudice for failure to make a substantial showing of the denial of a federal right.

It is further ORDERED that the Clerk shall transmit a true copy of this Judgment, together with

a true copy of the Order accepting the Findings, Conclusions, and Recommendation of the United States Magistrate Judge, to the parties.

Signed July 26, 2006.

/s/_____
David C. Godbey
UNITED STATES DISTRICT JUDGE

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 06-10872
USDC No. 3:04-CV-1396

[Filed February 5, 2007]

PATRICK TIMOTHY RICHARDSON,
Petitioner-Appellant,

versus

NATHANIEL QUARTERMAN, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION,
Respondent-Appellee.

Appeal from the United States District Court
for the Northern District of Texas

ORDER

Patrick Timothy Richardson, Texas prisoner # 928167, seeks a certificate of appealability (COA) to appeal the denial of his 28 U.S.C. § 2254 petition, wherein he challenged his conviction and sentence for murder. To obtain a COA, Richardson must make a

substantial showing of the denial of a constitutional right. *See* 28 U.S.C. § 2253 (c) (2). When a district court's denial of habeas relief is on the merits, the prisoner "must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

Richardson argued in his direct criminal appeal that the trial judge should have been recused. The state appellate court held that it was error to deny Richardson's recusal motion because a reasonable member of the public, knowing all the circumstances involved, would have questions or doubts as to the impartiality of the trial judge. The court held, however, that the error was harmless. Richardson argued in his § 2254 petition that the state appellate court incorrectly applied a harm analysis because its finding that there had been an appearance of bias amounted to structural error requiring automatic reversal and that, even applying a harm standard, the error was not harmless. The district court held that Richardson failed to show any actual bias by the trial judge, that the state court's conclusion that there was an appearance on bias was not entitled to deference, and that under the facts of the case no reasonable judge would have recused.

Richardson argues that the appearance of bias in the trial judge is a structural error under the Due Process Clause and that the state court's finding of an appearance of bias necessarily included a finding of a due process violation. Richardson has shown that reasonable jurists could debate the district court's assessment of his claim. *See Slack*, 529 U.S. at 484. A COA is therefore granted on the issue whether the

appearance of bias in a trial judge amounts to structural error and whether the state appellate court's conclusion here that a reasonable person could question the trial judge's impartiality necessarily included a finding of a due process violation that should have been afforded deference.

/s/_____
JACQUES L. WEINER, JR.
UNITED STATES CIRCUIT JUDGE

APPENDIX E

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 06- 10872

[Filed October 1, 2008]

PATRICK TIMOTHY RICHARDSON,

Petitioner - Appellant,

v.

NATHANIEL QUARTERMAN, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION,

Respondent - Appellee.

Appeal from the United States District Court for the Northern District of Texas, Dallas

ON PETITION FOR REHEARING EN BANC

(Opinion 1/30/08 , 5 Cir., _____, _____ F.3d _____)

Before JONES, Chief Judge, and GARWOOD, and JOLLY, Circuit Judges.

PER CURIAM:

(✓) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED. R. APP. P. and 5th CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

( ) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor (FED. R. APP. P. and 5th CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Witt Garwood
United States Circuit Judge